STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of S.R.S., Minor.

HAROLD C. SEXTON and SUZZANNE M. SEXTON,

Petitioners-Appellees,

v

BRANDY S. JOHNSTON,

Respondent-Appellant.

UNPUBLISHED
September 17, 2009

No. 291231
St. Clair Circuit Court
Family Division
LC No. 07-000573-AY

Before: Donofrio, P.J., and Wilder and Owens, JJ.

PER CURIAM.

Respondent, Brandy S. Johnston, appeals as of right from a circuit court order terminating her parental rights to the minor child pursuant to § 51(6) of the adoption Code, MCL 710.51(6). Because the trial court clearly erred in terminating respondent's parental rights because petitioners failed to prove, and the evidence as a whole did not clearly establish, that respondent had the ability to pay child support, we reverse.

Petitioner Harold Sexton and respondent are the parents of SRS, who was born in December 2001. Petitioner and respondent separated in 2002. Two years later, Sexton was awarded sole legal and physical custody of SRS. In October 2008, Sexton and his new wife filed a petition to terminate respondent's parental rights, which the trial court granted after an evidentiary hearing.

The trial court's findings of fact are reviewed for clear error. *In re Hill*, 221 Mich App 683, 691-692; 562 NW2d 254 (1997). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re BZ*, 264 Mich App 286, 296-297; 690 NW2d 505 (2004).

The trial court terminated respondent's parental rights under MCL 710.51(6), which provides, in pertinent part:

> If the parents of a child . . . are unmarried but the father has acknowledged paternity . . . , and if the parent having legal custody of the child subsequently

> marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent if both of the following occur:
>
> (a) The other parent, having the ability to support, or assist in supporting, the child, has failed or neglected to provide regular and substantial support for the child or if a support order has been entered, has failed to substantially comply with the order, for a period of 2 years or more before the filing of the petition.
>
> (b) The other parent, having the ability to visit, contact, or communicate with the child, has regularly and substantially failed or neglected to do so for a period of 2 years or more before the filing of the petition.

The petitioners in an adoption proceeding must prove both subsections (a) and (b) by clear and convincing evidence before termination can be ordered. *In re ALZ*, 247 Mich App 264, 272; 636 NW2d 284 (2001); *In re Hill*, *supra* at 691.

Section 51(6)(a) considers whether the respondent provided support if she had the ability to do so or, if an order of support had been entered, whether the respondent substantially complied with the order. MCL 710.51(6)(a). There is no dispute that a support order had not been entered against respondent and, therefore, the trial court was required to consider whether respondent, having the ability to do so, regularly and substantially supported the child under the first clause of § 51(6)(a).

The evidence presented at the hearing showed that respondent never paid support. However, petitioners failed to present any evidence regarding respondent's ability to pay support. The trial court nonetheless determined that respondent had the ability to pay support because respondent had testified, "If they wanted support I would have paid it[.]" While this statement suggested that respondent had the ability to pay support, it was countered by other evidence that respondent lacked sufficient funds to pay for court-ordered supervised visitation and to pay legal expenses associated with seeking relief from the order for supervised visitation. Thus, while there was some evidence that respondent might have been able to pay support, petitioners did not clearly and convincingly show that respondent actually had the ability to pay support. Accordingly, the trial court clearly erred in finding that § 51(6)(a) was proven by clear and convincing evidence. Because petitioners failed to prove one of the two necessary elements for termination, the trial court clearly erred in terminating respondent's parental rights.

In light of our conclusion that the evidence failed to establish that subsection (a) of § 51(6) was satisfied, it is unnecessary to address subsection (b).

Reversed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens